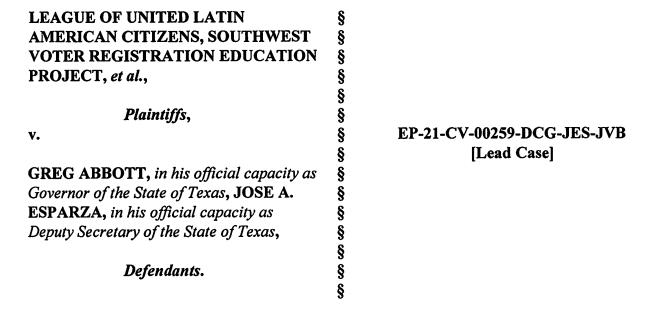
UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS EL PASO DIVISION



ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants Greg Abbott and Jose Esparza's "Motion to Dismiss, for a More Definite Statement, or to Strike" ("Motion") (ECF No. 12). In their Motion, the Defendants assert that Plaintiffs' claims under Section 2 of the Voting Rights Act must be dismissed because "[t]hey do not have a private cause of action to enforce Section 2." We disagree. Insofar as it addresses a cause of action by private parties to enforce Section 2, the motion to dismiss is DENIED.

The Defendants candidly acknowledge that "[t]he Supreme Court has never decided whether Section 2 contains an implied private cause of action" but "has often '[a]ssum[ed], for present purposes, that there exists a private right of action to enforce' Section 2" (citing *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion)). Strictly speaking, the Defendants are correct in averring that whether the VRA "furnishes an implied cause of action under § 2" is

"an open question.' Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring)."

The United States has filed a "Statement of Interest" (ECF No. 46) urging this three-judge court to deny dismissal on this ground. The Statement of Interest makes the following representation, which we have no reason to refute:

Throughout decades of Section 2 litigation challenging redistricting plans and voting restrictions in Texas and elsewhere, courts have never denied a private plaintiff the ability to bring Section 2 claims. See, e.g., LULAC v. Perry, 548 U.S. 399 (2006); Houston Lawyers' Ass'n v. Att'y Gen., 501 U.S. 419 (1991); [Thornburg v.] Gingles, 478 U.S. [30 (1986)]; Veasey [v. Abbott], 830 F.3d [216 (5th Cir. 2016) (en banc)]; Terrazas v. Clements, 581 F. Supp. 1329 (N.D. Tex. 1984) (three-judge court).

Id. at 3-4. The United States adds that "although the Supreme Court has not addressed an express challenge to private Section 2 enforcement, the Court's precedent permits no other holding." We agree, at least to the extent that it would be ambitious indeed for a district court—even a three-judge court—to deny a private right of action in the light of precedent and history.

We also suspect that the Defendants misconstrue *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001), in which the Court held up the text of 42 U.S.C. § 2000d as paradigmatic rightscreating language. That language seems to mirror Section 2's. ¹

Absent contrary direction from a higher court, we decline to break new ground on this particular issue. The Defendants' motion to dismiss for want of a private cause of action to enforce Section 2 of the Voting Rights Act is therefore **DENIED**.

¹ Compare 42 U.S.C. § 2000d ("No person . . . shall, on the ground of race, color, or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance."), with 52 U.S.C. § 10301(a) ("No . . . standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color").

So ORDERED and SIGNED on this <u>3</u>rd day of December 2021 on behalf of the

Three-Judge Panel.

AVID C. GUADERRAMA

UNITED STATES DISTRICT JUDGE